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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ALICIA BENHAM,

Plaintiff and Appellant,

v.

S&J SECURITY AND INVESTIGATION,
INC.,

Defendant and Appellant.

B207420

(Los Angeles County Super. Ct.
Nos. BC323316 c/w BC330701)

APPEALS from the judgments of the Superior Court of Los Angeles County,
Mary Thornton House, Judge. Affirmed.

Schonbrun DeSimone Seplow Harris & Hoffman, V. James DeSimone and Do
Kim for Plaintiff and Appellant.

Horvitz & Levy, Barry R. Levy, Bradley S. Pauley; Bradley & Gmelich, Thomas
P. Gmelich and Lena J. Marderosian for Defendant and Appellant.

Defendant and appellant S&J Security & Investigation, Inc. appeals from a judgment in favor of plaintiff and appellant Alicia Benham in this action arising out of Benham's false imprisonment by S&J's loss prevention agents. S&J contends: (1) judgment could not be entered against S&J based on an employee's violation of the Ralph Act (Civ. Code, § 51.7), because Benham waived all causes of action against S&J not covered by insurance and S&J's commercial liability policy excluded coverage for personal injuries caused by intentional acts; (2) the trial court prejudicially erred by refusing an instruction on respondeat superior liability requested by S&J; (3) the jury's finding that the violation occurred within the course and scope of employment is not supported by substantial evidence; (4) the jury awarded duplicative damages; and (5) the trial court improperly used the same factors to increase the lodestar amount of the attorney fee award and the multiplier.

In Benham's appeal, she contends the trial court abused its discretion in calculating the lodestar amount of attorney fees by arbitrarily reducing the hourly rates of her attorneys, as well as the number of hours reasonably worked.

We conclude S&J's insurance policy does not exclude coverage for vicarious liability for an employee's violation of the Ralph Act, the jury was properly instructed as to vicarious liability, substantial evidence supports the jury's finding that the conduct of S&J's employee was not motivated solely by personal reasons, the jury did not award duplicative damages, and the trial court did not abuse its discretion as to the amount of attorney fees awarded. Therefore, we affirm.¹

¹ This court takes judicial notice of certain documents filed in S&J's bankruptcy proceeding as requested by S&J. Benham's motion to augment the record with a partial reporter's transcript is granted. Benham's request that this court take judicial notice of documents filed in an unrelated case is denied.

FACTS

On April 17, 2004, Benham wanted to return or exchange nine weight loss formula drinks, because one of the drinks made her sick. She did not have a receipt and could not remember where she had purchased the drinks. Benham and her friend Daniel Newman tried to return the drinks to a Rite-Aid, but the store did not carry the brand. They stopped next at a Walgreens store which engaged the private security services of S&J's plain-clothed loss prevention agents.

Benham got out of the car to ask a manager about exchanging the drinks while Newman parked. However, she received a call on her cell phone and stayed in the parking lot to finish the call. Newman took the bag with the drinks out of the car and went to look for Benham in the store. When he could not find her, he thought she might be checking to see if the store carried the drink. He asked Walgreens employee Monica Maravilla where the diet drinks were located. She told him, and Newman saw the same brand of drinks that he had in the bag. He could see that the bottom shelf with the drinks was full. He walked past to find Benham to tell her that the store carried the drinks. He did not crouch down to look at the drinks, take out any drinks from his bag, or touch any of the drinks on the shelf. However, Maravilla told a coworker to call loss prevention, because she had seen Newman put a bottle in his bag in the diet drink aisle.

Newman found Benham outside the store and gave her the bag. They went back into the store together. Benham went to the return counter to speak to a manager about making a return. The manager would not accept the return without a receipt. He also pointed out that her drinks had expired.

As Benham was leaving the store, S&J's loss prevention agents Omar Ray and Christopher Ramos put their hands on her shoulders and told her to come with them. The agents had no access to the monitor that projected images from the security cameras or the security videotapes, but they told her repeatedly that they had her and Newman on tape. They suggested she could not get away with stealing, because she was so physically attractive that she was noticeable. The agents took her through a door and

down a hallway to a room in the back of the store. Newman was also detained. Benham began to cry.

Benham and Newman explained that the drinks were not stolen. Newman said their story could be verified if the agents watched the store's security video, checked the shelf to determine whether nine bottles were missing, compared the expiration dates of their drinks to those on the shelf, and called the Rite-Aid manager to confirm that they had just spoken with him about returning the drinks. The agents refused to investigate and rejected their story. Ramos handcuffed Newman and threatened to handcuff Benham.

When Benham initially refused to enter the store's training room, Ray pulled her to come in. The agents demanded Newman and Benham's personal information, but Benham refused. The agents yelled at them to admit they stole the drinks and continued to lie that videotape showed them stealing. Benham received a telephone call from a friend. Benham told her friend that she was being held in the back of a Walgreens, accused of stealing by agents who would not identify themselves, and she was scared. Ray yelled at her to get off the phone. He lunged toward her and knocked the telephone out of her hand. Ramos took Newman to another room.

Ray and Benham were in the room alone with the door closed. Ray asked Benham if she and Newman were a couple and if they were having sex. Benham was scared by the questions, because she knew they were inappropriate. Ray told Benham again that they had videotape of Newman stealing. While looking at her body, Ray told Benham that if she was "willing to work it out," he would let Newman go. Benham refused and tried to get up to call the police. Ray pushed her back into the chair. He told her that he was going to get handcuffs and she was "going to get it." While he was out of the room, Benham called 911. Ray returned to the room, took the telephone from her, and said he was going to send her to jail.

The agents had called the police to arrest Benham and Newman. The police learned of the 911 call shortly before arriving at the store. Benham told the officers that she had not been raped, but had felt she was in danger. Ray effected a citizen's arrest and

the police took Benham and Newman into custody. Benham was charged with a felony, stayed in jail overnight, and was released the following morning. Benham suffered chronic psychological injuries as a result of the threats and violence.

PROCEDURAL BACKGROUND

In March 2005, Benham filed a complaint against several defendants, including Walgreens, S&J, and Ray for causes of action including false imprisonment, negligence, assault and battery, intentional infliction of emotional distress, and violations of the Unruh Civil Rights Act (Unruh Act) (Civ. Code, § 51), the Ralph Act, and Civil Code section 51.9. In addition, Benham alleged a cause of action against Walgreens and S&J for negligent retention and supervision.

The trial court sustained a demurrer filed by Walgreens without leave to amend as to the causes of action for violations of the Unruh Act, the Ralph Act, and Civil Code section 51.9 on the grounds that no facts showed Walgreens intentionally discriminated against Benham because she was a woman. The trial court sustained S&J's demurrer to the cause of action for violation of Civil Code section 51.9, but overruled S&J's demurrer to the causes of action for violation of the Unruh Act and the Ralph Act.

S&J filed for bankruptcy protection on May 26, 2006, and the instant action was stayed pursuant to 11 United States Code Annotated section 362(a)(1). Benham filed a motion for relief from the automatic stay on the ground that the claim was insured and she was seeking recovery only from applicable insurance, expressly waiving "any deficiency or other claim" against S&J. S&J opposed the motion, and Benham filed a reply. In August 2006, after a hearing, the bankruptcy court granted the motion for relief from the automatic stay and ordered that Benham was "permitted to pursue those claims for relief, prayers for damages, and causes of action only to the extent said claims for relief, prayers for damages, and causes of action are covered under any policy or policies of insurance of Debtor, and to obtain judgment against Debtor's insurance carrier.

[Benham has] waived any ‘deficiency claims’ against Debtor not covered by insurance.” The bankruptcy case was closed on October 31, 2007.

Trial commenced on November 6, 2007. The jury returned two special verdict forms on November 28, 2007. In the first verdict, the jury found Ray, Walgreens and S&J were liable for false arrest and negligence. The jury also found liability as to S&J for negligent hiring by failing to require Ray to obtain a license that would have required a background check. The jury found past damages of \$850,000 and future damages of \$500,000. The jury assigned 20 percent of the liability to Ray, 40 percent to S&J, and 40 percent to Walgreens.

In the second verdict form, the jury found Ray did not discriminate against Benham under Civil Code section 51. However, the jury found liability for violation of Civil Code section 51.7, based on finding that Ray threatened or committed violent acts against Benham, Benham’s sex was a motivating reason for Ray’s conduct, Ray’s conduct was a substantial factor in causing harm to Benham, and Ray was acting within the course and scope of his employment with S&J when he committed the conduct. The jury found that as a result of being threatened or having violent acts committed against her because of her sex, Benham suffered damages of \$350,000 and would suffer additional damages of \$400,000 in the future.

The proposed judgment awarded \$1.35 million to Benham against Walgreens and \$2.1 million against S&J and Ray, plus fees and costs. S&J objected to the proposed judgment on the grounds that the damages for violation of Benham’s civil rights under Civil Code section 51.7 against S&J exceeded the scope of the bankruptcy stay, because the claim was not covered by S&J’s insurance policy and Benham waived “deficiency claims” not covered by S&J’s insurance policy. On January 7, 2008, the trial court entered the judgment awarding \$1.35 million to Benham against Walgreens and \$2.1 million against S&J and Ray, plus fees and costs. S&J filed a motion for a new trial on several grounds, including the insurance coverage and waiver issues. The trial court denied the motion for a new trial on March 10, 2008. S&J filed a timely appeal.

On May 16, 2008, the trial court awarded attorney fees of \$456,750 to Benham under Civil Code section 52, subdivision (b)(3), based on the finding of liability under the Ralph Act. S&J filed a timely appeal from the attorney fee award and Benham filed a cross-appeal. In April 2008, Walgreens paid \$1,406,210.91 to Benham and filed a motion for contribution against S&J. This court consolidated S&J's appeals and the cross-appeal on November 19, 2008.

DISCUSSION

Statutory Law

The Ralph Act provides that “[a]ll persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of political affiliation, or on account of any characteristic listed or defined in subdivision (b) or (e) of [Civil Code s]ection 51, or position in a labor dispute, or because another person perceives them to have one or more of those characteristics. The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive.” (Civ. Code, § 51.7.)

Civil Code section 51, subdivision (b), provides: “All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, marital status or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”

Coverage for Ralph Act Claim

S&J contends that although the insurance policy provides coverage for personal injury damages arising out of false imprisonment, Benham's damages are excluded from

coverage because her injuries were caused by Ray's intentional conduct. However, this exclusion does not apply to S&J's vicarious liability for Benham's personal injuries.

A. Standard of Review

We interpret an insurance policy as a question of law using the ordinary rules of contract interpretation. (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115 (*Palmer*).) The mutual intent of the parties to the contract at the time the contract was formed governs. (Civ. Code, § 1636; *Palmer, supra*, at p. 1115.) We ascertain that intent solely from the written contract, if possible. (Civ. Code, § 1639; *Palmer, supra*, at p. 1115.) We consider the policy as a whole and construe the language in context, rather than interpret a provision in isolation. (Civ. Code, § 1641; *Palmer, supra*, at p. 1115.) If contractual language is clear and explicit and does not involve an absurdity, the plain meaning governs. (Civ. Code, § 1638; *Palmer, supra*, at p. 1115.) Contractual language is ambiguous and there is no plain meaning only if the language is susceptible of more than one reasonable interpretation. (*Palmer, supra*, at p. 1115.) Exclusionary clauses are construed strictly against the insurer and liberally in favor of the insured. (*American States Ins. Co. v. Borbor* (9th Cir. 1987) 826 F.2d 888, 894.)

B. Policy Provisions

At the time that S&J employees detained Benham, S&J was the named insured on a commercial general liability policy issued by Scottsdale Insurance Company. "Coverage A" insured liability for damages for "'bodily injury' . . . caused by 'an occurrence,'" which is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." However, bodily injury that is "expected or intended from the standpoint of the insured" was excluded from coverage, as was bodily injury arising out of "personal and advertising injury."

“Coverage B” insured liability for damages for “personal and advertising injury,” which was defined as “injury, including consequential ‘bodily injury,’ arising out of one or more of the following offenses: . . . false arrest, detention or imprisonment” However, coverage B excluded from this coverage knowing violations of another person’s rights. Specifically, it excluded “‘personal and advertising injury’ caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury.’”

S&J’s employees were also considered “an insured” under the policy, “but only for acts within the scope of their employment by [S&J] or while performing duties related to the conduct of [S&J’s] business.”

C. Analysis

S&J’s policy excludes coverage for personal injuries that were “caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict ‘personal and advertising injury.’” However, the acts that are excluded from coverage are the acts of the insured seeking coverage under the policy, not the acts of other co-insured persons. (*American States Ins. Co. v. Borbor*, *supra*, 826 F.2d at p. 894.) “Had [the insurer] intended that the wrongful act of *any* insured would void the policy, it could have unambiguously drafted and included such language in the contract. [Citations.] For example, in *Spezialetti v. Pacific Employers Ins. Co.*, 759 F.2d 1139 (3rd Cir. 1985), an innocent co-insured was precluded from recovering under a fire insurance policy where that policy denied coverage for a loss caused by the dishonest act of ‘any’ insured. There, the Third Circuit noted that using the term ‘the insured’ creates uncertainty in circumstances where the various persons covered by the policy may have adverse or joint interests. [(*Id.* at p. 1141.)] The court determined that the uncertainty does not exist, however, when the policy exclusion refers to ‘any insured.’ [(*See also Ryan [v. M.F.A. Mut. Ins. Co.* (Tenn. App. 1980)] 610 S.W.2d [428,] 437.)] Thus, the parties may pre-ordain the extent of coverage by clear and unambiguous contract terms.

[Citations.]” (*American States Ins. Co. v. Borbor*, *supra*, 826 F.2d at p. 894.) The exclusion does not preclude indemnification of an innocent or negligent insured’s vicarious liability for a co-insured’s intentional acts. (*Ibid.*; *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 305, fn. 9 (*Lisa M.*).)

Instructional Error

S&J contends the trial court erred by refusing to give a special instruction on respondeat superior requested by S&J. We disagree.

A. Standard of Review

A party is entitled, upon request, to have the court give nonargumentative, correct instructions on every theory of the case that is supported by substantial evidence. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*).) “Instructions should state rules of law in general terms and should not be calculated to amount to an argument to the jury in the guise of a statement of law. [Citations.] Moreover, it is error to give, and proper to refuse, instructions that unduly overemphasize issues, theories or defenses either by repetition or singling them out or making them unduly prominent although the instruction may be a [correct] legal proposition. [Citations.]” (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 718.)

Instructional error in a civil case is not grounds for reversal unless it is probable the error prejudicially affected the verdict such that a result more favorable to the appealing party would have resulted. (Cal. Const., art. VI, § 13; *Soule*, *supra*, 8 Cal.4th at p. 580.) We assess whether actual prejudice occurred in the context of the individual trial record, evaluating “(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel’s arguments, and (4) any indications by the jury itself that it was misled.” (*Soule*, *supra*, at pp. 580-581, fn. omitted.)

B. Principles of Respondeat Superior

“Under the respondeat superior doctrine, an employer’s liability extends to torts of an employee committed within the scope of his employment. (*Munyon v. Ole’s, Inc.* (1982) 136 Cal.App.3d 697, 701.) This includes willful and malicious torts as well as negligence. (*Carr v. Wm. C. Crowell Co.* (1946) 28 Cal.2d 652.)” (*Martinez v. Hagopian* (1986) 182 Cal.App.3d 1223, 1227.) Conduct that disregards the employer’s express orders or does not benefit the employer may still be considered within the scope of employment. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209 (*Mary M.*).) “Nevertheless, if an employee inflicts an injury out of personal malice, not engendered by the employment, the employer is not liable. [Citation.]” (*Martinez v. Hagopian, supra*, at p. 1227.)

The determination of whether an employee’s tort was committed within the scope of employment is based on whether the conduct was ““typical of or broadly incidental to . . .”” the employee’s duties, or ““a generally foreseeable consequence . . .”” of the enterprise. (*Lisa M., supra*, 12 Cal.4th at pp. 297-300; *Martinez v. Hagopian, supra*, 182 Cal.App.3d at p. 1227.) There must be a “causal nexus” between the intentional tort and the employee’s work. (*Maria D. v. Westec Residential Security, Inc.* (2000) 85 Cal.App.4th 125, 143.) The employee’s motive is relevant: “An act serving only the employee’s personal interest is less likely to arise from or be engendered by the employment than an act that, even if misguided, was intended to serve the employer in some way.” (*Lisa M., supra*, at p. 298.)

An assault occurring in the course of the performance of the employee’s duties may be within the scope of employment. (See *Stansell v. Safeway Stores, Inc.* (1941) 44 Cal.App.2d 822, 825-826 [grocery store manager lost his temper and assaulted customer at least in part from excessive zeal in performance of duty].) An employer may also be vicariously liable for an employee’s assault or battery resulting from a work-related dispute. (See *Carr v. Wm. C. Crowell Co., supra*, 28 Cal.2d at pp. 655-657 [contractor threw a hammer at subcontractor during dispute over contractor’s performance].)

“Nonsexual assaults that were not committed to further the employer’s interests have been considered outgrowths of employment if they originated in a work-related dispute. (E.g., *Fields v. Sanders* [(1947)] 29 Cal.2d [834,] 839-840 [employee truck driver's assault on another motorist following dispute over employee’s driving]; see, generally, *Farmers Ins. Group v. County of Santa Clara* [(1995)] 11 Cal.4th 992, 1006 [(*Farmers*)).) ‘Conversely, vicarious liability [has been] deemed inappropriate where the misconduct does not arise from the conduct of the employer’s enterprise but instead arises out of a personal dispute (e.g., *Monty v. Orlandi* (1959) 169 Cal.App.2d 620, 624 [bar owner not vicariously liable where on-duty bartender assaulted plaintiff in the course of a personal dispute with his common law wife]), or is the result of a personal compulsion (e.g., *Thorn v. City of Glendale* (1994) 28 Cal.App.4th 1379, 1383 [city not vicariously liable where fire marshal set business premises on fire during an inspection].)’ [Citation.]” (*Lisa M.*, *supra*, 12 Cal.4th at pp. 300-301.)

“[S]everal decisions have addressed whether an employee’s sexual misconduct directed toward a third party is within the scope of employment for respondeat superior purposes. Those cases hold that, except where sexual misconduct by on-duty police officers against members of the public is involved [citations], the employer is not vicariously liable to the third party for such misconduct [citations]. In those decisions, vicarious liability was rejected as a matter of law because it could not be demonstrated that the various acts of sexual misconduct arose from the conduct of the respective enterprises. In particular, the acts had been undertaken solely for the employees’ personal gratification and had no purpose connected to the employment. Moreover, the acts had not been engendered by events or conditions relating to any employment duties or tasks; nor had they been necessary to the employees’ comfort, convenience, health, or welfare while at work.” (*Farmers*, *supra*, 11 Cal.4th at p. 1007.)

“Neither physical violence nor sexual exploitation is legitimate, excusable or routinely expected in the workplace.” (*Lisa M.*, *supra*, 12 Cal.4th at p. 300.) “[T]he roots of sexual violence and exploitation” are not so inherently different from “those other abhorrent human traits” that we may conclude sexual misconduct in the workplace

to be unforeseeable as a matter of law. (*Ibid.*) “As with these nonsexual assaults, a sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions.” (*Id.* at p. 301.)

C. Instruction Given

The trial court instructed the jury on the principles of respondeat superior in the language of Judicial Council of California Civil Jury Instructions (2008-2009) CACI Nos. 3720 and 3723 as follows: “Plaintiff Alicia Benham must prove that defendant Omar Ray was acting within the scope of his employment by defendant S&J Security and Investigation, Incorporated when plaintiff Alicia Benham was harmed. Conduct is within the scope of employment if: (A) it is reasonably related to the kind of task that the employee was employed to perform or, (B) it is reasonably foreseeable in light of the employee’s job responsibilities.

“If an employee combines his or her personal business with the employer’s business, then the employee’s conduct is within the scope of employment and authorization. However, if it clearly appears at the time of the conduct that the employee was not performing work for his or her employer, either directly or indirectly, but was acting only for his or her own personal reasons, then the conduct was not within the scope of employment or authorization.

“An employee’s conduct that slightly deviates from an employee’s work is to be expected. For example, acts that are necessary for an employee’s comfort, health and convenience while [they] work are within the scope of employment.”

D. Instruction Refused

S&J requested the trial court instruct the jury as follows: “Sexual misconduct or personal malice is not within the course and scope of one’s employment and is not attributable to the employer. [¶] An employee who commits such acts does so outside of

the scope of his authority as a matter of law unless his motivation for committing such acts are fairly attributable to work-related events or conditions.”

E. Analysis

S&J contends the instructions given were incorrect because different standards control vicarious liability for negligence and intentional torts. This is incorrect. The instructions given by the trial court were an accurate statement of law. As to both types of torts, the determination of whether an employee’s tort was committed within the scope of employment is based on whether the conduct was ““typical of or broadly incidental to . . .”” the employee’s duties, or ““a generally foreseeable consequence . . .”” of the enterprise. (*Lisa M.*, *supra*, 12 Cal.4th at pp. 297-299.)

The instruction proposed by S&J was inaccurate, misleading, and argumentative. Threats and acts of violence, including those motivated by the victim’s gender, are considered to be within the scope of employment if the motivating emotions for the tort were fairly attributable to work-related events or conditions. S&J’s instruction was argumentative to the extent it characterized threats and acts of violence based on gender as sexual misconduct. The instruction was misleading, because the first sentence states sexual conduct and personal malice are not attributable to the employer, when the Supreme Court in *Lisa M.* clearly states that such conduct is not unforeseeable as a matter of law. Therefore, the instruction was properly rejected. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists*, *supra*, 227 Cal.App.2d at p. 718.)

Moreover, the trial court instructed the jury in appropriately general terms that conduct solely for an employee’s personal reasons is not within the scope of employment. This is substantially equivalent to stating that conduct motivated by emotions that are not attributable to work-related events or conditions is not within the scope of employment. “Error cannot be predicated on the trial court’s refusal to give a requested instruction if the subject matter is substantially covered by the instructions given. [Citations.]” (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1217.)

Conduct Within the Scope of Employment

S&J contends that Ray's actions were outside the scope of his employment as a matter of law. We conclude substantial evidence supports the jury's finding that Ray was acting within the course and scope of his employment when he committed the civil rights violation.

"Ordinarily, the determination whether an employee has acted within the scope of employment presents a question of fact; it becomes a question of law, however, when 'the facts are undisputed and no conflicting inferences are possible.' [Citation.] In some cases, the relationship between an employee's work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment. [Citations.]" (*Mary M., supra*, 54 Cal.3d at p. 213.) However, when the evidence gives rise to conflicting inferences, our review is limited to the substantial evidence standard. We "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor." (*Ninety Nine Investments, Ltd. v. Overseas Courier Service (Singapore) Private, Ltd.* (2003) 113 Cal.App.4th 1118, 1127.)

In this case, substantial evidence supports the jury's finding that although Benham's gender was a motivating reason for Ray's threats and violent acts, his conduct arose out of the performance of his duties as a loss prevention agent. A female Walgreens employee reported witnessing a shoplifter. Ray would be expected to investigate the report as part of his duties as a loss prevention agent. The threats and violent acts committed in this case were that Ray knocked a cellular telephone out of Benham's hand, pushed her back into a chair when she tried to leave, and threatened that she was "going to get it" before searching for handcuffs. A loss prevention agent detaining a suspected shoplifter might be expected to prevent the person from using a telephone during an interview or leaving the premises. The agents had already placed handcuffs on Newman without threats or acts of violence based on a protected characteristic. The jury could reasonably infer that Ray was performing his duties as a

loss prevention agent at the time that he committed threats and acts of violence based on Benham's gender. The jury could reasonably find that in addition to the motivation based on Benham's gender, Ray had a motivation related to the protection of Walgreens' property. The threats and violent acts were broadly incidental to his employment duties, and he did not substantially deviate from his employment duties solely for personal purposes. The jury could find the threats and violent acts were motivated or triggered by employment activities, in addition to animus based on Benham's gender. Moreover, the conduct was foreseeable. The nature of the work involved to detain shoplifters predictably created a risk that a detention would escalate to threats of violence or violent acts in detaining a suspect. The jury's finding that Ray was acting within the scope of his employment was supported by substantial evidence.

Damages

S&J contends the jury imposed duplicative damages. We conclude the evidence showed the jury carefully apportioned damages and there is no evidence of duplicative damages.

The jury could reasonably find Benham suffered emotional distress damages as a result of the false arrest and negligence, and additional emotional distress damages as a result of being subjected to threats and acts of violence during that experience. It was also clear from the verdicts that the jury did not award duplicative damages. Walgreens stated in closing argument that it was not liable for any damages caused by Ray's threats and acts of violence against Benham in violation of her civil rights. The verdict forms provided for the jury to apportion damages to false imprisonment and negligence on one verdict form and violation of the Ralph Act on the other. The damages on the first verdict form were allocated among Ray, Walgreens, and S&J, whereas the damages for the Ralph Act violation were solely attributable to Ray and S&J. The jury instructions also specifically stated which cases of action were alleged against which defendants. The amount of damages found by the jury to have resulted from the common law torts

(\$850,000 for past damages and \$500,000 for future damages) was different than the damages attributed to the Ralph Act violation (\$350,000 for past damages and \$400,000 for future damages). The jury allocated equal responsibility for Benham's harm from the common law torts to Walgreens and S&J, while Ray and S&J alone were responsible for the harm resulting from the Ralph Act violation. We conclude there is no evidence the jury awarded duplicative damages.

Attorney Fees

Both S&J and Benham contend the trial court abused its discretion in calculating the attorney fees awarded to Benham pursuant to Civil Code section 52. We find no abuse of discretion.

A. Trial Court Ruling Awarding Attorney Fees

Benham's attorneys requested an award of attorney fees pursuant to Civil Code section 52. Based on 2,886 hours of attorney and paralegal time, Benham requested a lodestar amount of \$1,100,738.75 and a multiplier of 2.0, for a total attorney fee award of \$2,201,477.50.

After a hearing, the trial court issued a written ruling awarding attorney fees. The court found that although the case was protracted and the use of multiple counsel was appropriate, the hours claimed for the Ralph Act cause of action were excessive. Two plaintiffs were represented until Newman settled close to the time of trial, greater damages were awarded on the common law claims than the cause of action permitting the award of attorney fees, and a significant percentage of the initial fees were generated as a result of challenges to the complaint. The court relied on these factors to conclude the hours were excessive and required reduction.

In addition, although Benham's counsel might be civil rights experts, the facts of the case were straightforward and the theories of recovery did not require their expertise.

There were multiple challenges to the adequacy of the pleadings, which did not reflect the novelty of the law in the case, but resulted “because little effort seemed to have been made to state a cause of action which set forth the necessary facts.”

The case involved several issues that were extraneous to the Ralph Act claim, for which Benham was not entitled to recover attorney fees. The trial court found significant overlap in the attorneys’ billing and a comprehensive review of the billing records revealed unwarranted charges.

However, the trial court acknowledged that the result in the case was remarkable and the attorneys took the case on a contingency basis, which should be reflected in the award of attorney fees.

Therefore, the trial court awarded the following fees, after reducing the requested fees and hours: \$170,000 for work performed by Attorney V. James DeSimone, based on \$425 per hour for 400 hours of work, rather than the requested rate of \$600 per hour for 810.5 hours of work, because the trial court expressly found the litigation did not reflect that he spent 810.5 hours of compensable time on the case; \$90,000 for the work of Attorneys Do Kim and Gina Amato at the requested rate of \$275 per hour, which is compensation for approximately 327 hours of work rather than the reported 1,626.25 hours; \$18,000 for the work of Attorney Benjamin Schonbrun at \$300 per hour for 60 hours of work, rather than the requested \$650 per hour for 132.7 hours; \$9,000 for the work of Attorney Michael Seplow at \$300 per hour for 30 hours, rather than the requested \$500 per hour for 52.1 hours; \$10,000 for the work of Attorney Melanie Partow at the requested \$200 per hour, which is approximately 50 hours of work rather than the reported 111.9; and \$7,500 for the work of paralegal Italia Almeida at the requested rate of \$100, which is compensation for approximately 75 hours of work, rather than the reported 152.9 hours. The total lodestar amount was \$304,500. The trial court applied a multiplier of 1.5 based on the facts above. Therefore, the total amount of the attorney fee award was \$456,750.

B. Calculation of Attorney Fees and Standard of Review

“[A] court assessing attorney fees begins with a touchstone or lodestar figure, based on the ‘careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.’ [Citation.] We expressly approved the use of prevailing hourly rates as a basis for the lodestar, noting that anchoring the calculation of attorney fees to the lodestar adjustment method “‘is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.’” [Citation.] In referring to ‘reasonable’ compensation, we indicated that trial courts must carefully review attorney documentation of hours expended; ‘padding’ in the form of inefficient or duplicative efforts is not subject to compensation. [Citation.]” (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1132.)

“[T]he lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award. [Citation.] The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. The “‘experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.’” [Citation.]” (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1132.)

C. Reduction of Hours and Charges

Benham contends the trial court abused its discretion in determining the number of hours reasonably spent in connection with the Ralph Act claim and reducing the hourly rates of Attorneys DeSimone, Schonbrun, and Seplow. We find no abuse of discretion.

It is clear that the trial court carefully reviewed the hourly billing records. The trial court found unwarranted and duplicative charges. No abuse of discretion is shown in the trial court's allocation of fees to the Ralph Act claim, as opposed to the fees attributable to common law claims or the claims of another plaintiff who settled prior to trial which were not compensable.

The trial court noted the attorneys' reputations, skill, and experience. However, the trial court explained that the rate determinations were based on the simplicity of the facts and the lower level of expertise required in this case. The trial court did not act arbitrarily or capriciously in setting rates or reducing the hours to reflect the time fairly attributable to the Ralph Act claim.

D. Multiplier

S&J contends the trial court abused its discretion by using the same factors to calculate the lodestar amount and to determine whether a multiplier was appropriate. We disagree.

"[W]hen the record expressly demonstrates that the trial court has considered the same factors twice, and has used them not only to calculate a reasonable hourly rate for purposes of awarding the lodestar award amount but also to enhance it, impermissible double counting or a windfall may result." (*Ramos v. Countrywide Home Loans, Inc.* (2000) 82 Cal.App.4th 615, 626.)

The record shows that the trial court dramatically reduced the requested lodestar amount based on finding the hours claimed by Benham's attorneys included work that was not attributable to the Ralph Act claim, and the attorneys' rates were high for the

expertise required and exhibited in this particular case. The record does not show that the trial court increased the lodestar amount based on the “remarkable” results or the contingency nature of the case. Rather, the trial court justified applying a multiplier based on these facts. No abuse of discretion has been shown.

DISPOSITION

The judgment is affirmed. The parties are to bear their own costs on appeal.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.